NO. 84-55

Office-Supreme Court, U.S.
FILED
JUL 12 1984
ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1984

EMPLOYERS NATIONAL INSURANCE COMPANY,

Petitioner

versus

JORGE OCHOA,

Respondent

## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

THOMAS W. THORNE, JR.,
Counsel of Record
LEMLE, KELLEHER, KOHLMEYER,
HUNLEY, MOSS & FRILOT
21st Floor, Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130-6097
Telephone: 504/586-1241

Attorneys for Employers National
Insurance Company, Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

5/PP

## QUESTIONS PRESENTED FOR REVIEW

Petitioner submits that its application for Writ of Certiorari to the Court of Appeals for the Fifth Circuit presents the following questions for review:

1. Whether the decision of the Court of Appeals is consistent with the intent of the Act and the rationale of this Court's opinion in *Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74, 100 S.Ct. 925 (1980).

2. Whether, in the present factual context, a stevedore may properly be charged, in effect, with a portion of a longshoreman's attorney fees.

3. Whether a longshoreman is entitled to any net recovery when the stevedore's lien has not been satisfied in full.

4. The effect of an abortive appeal by the longshoreman from a lower court judgment which causes the stevedore's lien to be increased and its recovery to be reduced.

## CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 28.1, Petitioner states that the parent company of Employers National Insurance Company is Employers Casualty Company and that Texas Employers Insurance Association is an affiliated company.

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# PETITION FOR WRIT OF CERTIORARI

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## DECISIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit is reported under the style *Ochoa v. Employers Nat. Ins. Co.*, at 724 F.2d 1171 (1984).

## JURISDICTION

Petitioner seeks a writ to the United States Court of Appeals for the Fifth Circuit to review its decision and order filed on February 13, 1984. A petition for rehearing and a suggestion for rehearing en banc were denied by the

Court of Appeals in an order entered on April 18, 1984. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The District Court has jurisdiction pursuant to 28 U.S.C. §1332 and 28 U.S.C. §1333.

## STATUTE INVOLVED

This petition raises issues under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq;* and more specifically Section 933 which reads:

> COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE
>
> SEC. 33.(a) If an account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
>
> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner *or Board* shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.
>
> (c) The payment in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner *or Board*);

(B) the cost of all benefits actually furnished by him to the employee under section 7;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

(f) If the person entitled to compensation institutes proceedings within the period prescribed in section 33(b), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

## STATEMENT OF THE CASE

Jorge Ochoa, a longshoreman employed by New Orleans Stevedoring Company, hereinafter referred to as longshoreman, was injured on October 3, 1978 aboard the M/S THE JOSEPH P. HEWES owned and operated by Waterman Steamship Company. He was paid voluntary compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act by his employer's carrier, Employers National Insurance Company, hereinafter referred to as stevedore. He subsequently filed suit for damages against the shipowner in the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. §1332 and §1333; stevedore duly intervened.

His claim for damages was tried to a jury on November 26, 1980 which awarded a gross recovery against the shipowner of $54,437.00. Following the entry of judgment, and contrary to the interests of stevedore, longshoreman appealed to the United States Court of Appeals for the Fifth Circuit on the grounds that quantum of damages awarded was inadequate. The shipowner was prepared to

pay the judgment but upon the longshoreman's appeal from the judgment, filed a cross-appeal seeking reversal of the lower court's judgment. Since the judgment against the shipowner was not final, stevedore, at the insistence of longshoreman's counsel, was obliged to continue weekly payment of compensation benefits. At the time of the district court's judgment, stevedore's compensation lien was $27,922.00. During the pendency of the appeal and cross-appeal which were ultimately denied per curiam, the compensation lien increased to $42,025.00 and the gross recovery against the shipowner increased, through interest since date of judgment, to $62,058.00 which sum was duly paid by the shipowner into the registry of the court.

Once the judgment became final, stevedore moved to amend the judgment to reflect its additional compensation payments and to recover its full lien out of the judgment which was granted by the district court over longshoreman's counsel's opposition that this would leave insufficient funds to pay his fee. Longshoreman, through his counsel, appealed alleging that his 40% contingency fee contract was based on the gross recovery and primed stevedore's compensation lien. The Fifth Circuit reversed and concluded *inter alia* that longshoreman's attorney's fee based on a percentage of the gross recovery primed the compensation lien. The following comparisons are illustrative only:

At the time of the original judgment, the allocation, depending on the priority accepted, was:

| LONGSHOREMAN'S COUNSEL | STEVEDORE |
|---|---|
| $54,437 Judgment | $54,437 Judgment |
| - 6,263 expenses[1] | - 6,263 expenses |
| 48,174 | 48,174 |
| - 19,259 Attorney's lien (40% of gross) | - 27,922 comp lien |
| 28,915 | 20,252 |
| - 27,922 comp lien | - 8,101 Attorney's lien (40% of net) |
| $ 993 to longshoreman | $12,151 to longshoreman |

Thus, prior to longshoreman's abortive appeal against shipowner, stevedore recovers its full lien even under longshoreman's counsel's argument and rationale of the Court of Appeals' decision as *Bloomer, supra,* squarely controls.

Following the longshoreman's abortive appeal against the shipowner, the stevedore's lien increases to $42,025.00 and the allocation, depending on the priority accepted, is:

| LONGSHOREMAN'S COUNSEL | STEVEDORE |
|---|---|
| $54,437 Judgment ($62,058)[2] | $54,437 Judgment |
| - 6,263 expenses | - 6,263 expenses |

[1] There is no dispute that longshoreman's expenses, when proven and exclusive of attorney's fee, must be paid first.

[2] The Court of Appeals' use of the ultimate amount paid by the shipowner, i.e. $62,058 ($54,437 plus interest), confuses, we submit, an already difficult problem, as all parties would share in the interest paid on the original allocation.

| LONGSHOREMAN'S COUNSEL | | STEVEDORE | |
|---|---|---|---|
| 48,174 | | 48,174 | |
| - 19,259 | Attorney's lien (40% of gross) | - 42,025 | comp lien |
| $28,915 | Balance to pay $42,025 lien | $ 6,149 | |
| | | - 2,460 | Attorney's lien (40% of net) |
| ($13,110) | net loss to stevedore | $ 3,689 | to longshoreman |
| zero | to longshoreman | | |

Thus under the Court of Appeals' decision, had longshoreman not appealed, stevedore would have been reimbursed in full instead of losing, because of the appeal, $13,110.00.

Under the decision below, the above figures in the longshoreman's allocation are not fixed since on remand, the district court must first determine the reasonableness of the 40% attorney's fee and then make an equitable adjustment of that figure between the longshoreman and his attorney. The loss to the stevedore, on the other hand, is now a fait accompli.

This petition for writ of certiorari follows.

## ARGUMENT

Given the absence in the Longshoremen's and Harbor Workers' Compensation Act, see 33 U.S.C. §933, of an express provision for the payment of attorney's fees where the longshoreman, rather than the employer, effects a recovery against the negligent shipowner, the lower courts have long been troubled by the proper allocation of that recovery as between the longshoreman, his attorney and

the compensation carrier. In the Fifth Circuit alone, we have seen *Strachan Shipping Co. v. Melvin*, 327 F.2d 83 (CA 5 1964); *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (CA 5 1967), *cert. denied*, 385 U.S. 1020, 87 S.Ct. 731 (1967); *Chouest v. A&P Boat Rentals, Inc.*, 472 F.2d 1026 (CA 5 1973), *cert. denied*, 412 U.S. 949, 93 S.Ct. 3012 (1974); *Mitchell v. Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d 1274 (CA 5 1978).

In 1979, this Court broke a long silence and granted certiorari to resolve this recurring question as to which the Courts of Appeals have been divided. This Court's ensuing opinion in *Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74, 100 S.Ct. 925 (1980), in a different factual context,[3] concluded that the stevedore (compensation intervenor) should not be required to pay a share of the longshoreman's attorney's fee and rejected the argument, as measured against the language, structure and history of the Longshoremen's and Harbor Workers' Compensation Act, that equity dictated that the stevedore bear a portion of the longshoreman's attorney's fee in order to effect a greater net recovery for the longshoreman.

This Court noted but did not address the problem in the factual context here presented where the judgment is insufficient to pay in full the plaintiff's attorney's fee based on a percentage of the gross recovery and the compensation lien, *Bloomer, supra*, at 445 U.S. 85, 100 S.Ct. 932, Footnote 13. This problem is now before the Court.

The first Court of Appeals, *post Bloomer, supra*, to

[3] The amount of the settlement was sufficient to pay plaintiff's attorney's fee based on a percentage of the total settlement and the compensation lien in full.

address the problem was the Seventh Circuit in *Johnson v. Sioux City & New Orleans Barge Lines, Inc.*, 629 F.2d 1244 (CA 7 1980) (per curiam), *cert. denied*, 449 U.S. 987, 101 S.Ct. 408 (1980) which concluded, based on its interpretation of *Bloomer, supra*, that longshoreman's attorney's fee should be based on the net recovery, after payment in full of the compensation lien.

The next Court of Appeals, *post Bloomer, supra*, to address this problem was the Second Circuit in *Incorvaia v. Hellenic Lines, Ltd.*, *"GRIGORIOS-C-IV"*, 668 F.2d 650 (CA 2 1982), *cert. denied*, __ U.S. __, 103 S.Ct. 293 (1982) which concluded, based on its interpretation of *Bloomer, supra*, that the stevedore's lien did not prime the plaintiff's attorney's fee based on the gross recovery, likening this fee to other legal expenses which admittedly must be paid first.

Finally, we have the Court of Appeals for the Fifth Circuit in the divided opinion below, 724 F.2d 1171 (CA 5 1984), in which the majority of the panel noted the conflict between the Seventh and Second Circuits' opinions, at p. 1175, but, based on this interpretation of *Bloomer, supra*, reaches still another solution of the problem, namely, that the compensation lien is primed by a reasonable attorney's fee based on the gross recovery, which in turn is subject to equitable allocation between the longshoreman and his attorney, contrary to the rule in the Second Circuit.

At this point, we must add that the present case also contains a factual component which, to our knowledge has never been faced by any of the Courts of Appeals which have sought to resolve this difficult problem, pre or post *Bloomer, supra*, namely the filing by the longshoreman here of an abortive appeal from the district court's

judgment against the shipowner on the issue of damages only, contrary to the stevedore's interests, since it caused the amount of its lien to be increased from $27,922.00 to $42,025.00. Under the rationale of the Second Circuit in *Incorvaia, supra,* and *Valentino v. Rickners Rhederei, G.M.B.H., SS ETHA,* 552 F.2d 466 (CA 2 1977), i.e. the beneficiary of the fund theory, the Fifth Circuit's result would not be justified; moreover, the Second Circuit does not permit any recovery by the longshoreman in this factual context. This issue was argued to the Court below in stevedore's original brief and more specifically in its petition for rehearing but is not addressed by the Court of Appeals below in its original opinion or in its order denying rehearing.

## CONCLUSION

Thus, in the four years since this Court's opinion in *Bloomer, supra,* three Courts of Appeals interpreting *Bloomer, supra,* have reached three conflicting conclusions as to the resolution of the remaining problem. The conflict within the Circuits involving the interpretation of the Longshoremen's and Harbor Workers' Compensation Act which prompted this Court to grant a writ of certiorari in *Bloomer, supra,* is again present with these added ingredients, namely the proper inferences to be drawn from this Court's opinion in *Bloomer* and the fact that, but for the longshoreman's abortive appeal, *Bloomer, supra,* squarely governed and stevedore would have recovered its lien as it then existed in full.

It is hoped that, notwithstanding this Court's heavy docket, this Court will grant the present petition to complete its resolution of this recurring problem.

A writ of certiorari should issue to the Court of Appeals for the Fifth Circuit to review the issues raised by its decision.

Respectfully submitted,

THOMAS W. THORNE, JR.,
Counsel of Record
LEMLE, KELLEHER, KOHLMEYER,
HUNLEY, MOSS & FRILOT
21st Floor, Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130-6097
Telephone: 504/586-1241

Attorneys for Employers National
Insurance Company, Petitioner

## CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court representing the petitioner herein and that three copies of the above petition for writ of certiorari to the Fifth Circuit Court of Appeals were served upon counsel for the respondent, first class postage prepaid, addressed to his office in New Orleans, Louisiana, this 11th day of July, 1984.

THOMAS W. THORNE, JR.,
Attorney for Petitioner

# APPENDIX "A"

**Jorge OCHOA,**

**Plaintiff-Appellant,**

**v.**

**EMPLOYERS NATIONAL INSURANCE CO. et al.,**

**Intervenors-Appellees,**

**Waterman Steamship Corp.,**

**Defendant.**

**No. 82-3618.**

United States Court of Appeals,
Fifth Circuit.

Feb. 13, 1984.

After longshoreman recovered amount in third-party action against negligent shipowner which was insufficient to cover both attorney fees and compensation carrier's lien, dispute arose as how to properly allocate the recovery. The United States District Court for the Eastern District of Louisiana, at New Orleans, Robert F. Collins, J., awarded full reimbursement to the compensation carrier at the expense of the attorney. Longshoreman appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) stipulation between longshoreman and intervening carrier with respect to amount of compensation benefits and medical expenses paid to longshoreman or for his benefit did not have effect of giving priority to carrier over payment of attorney fees; (2) lien of compensation carrier was payable out

of net recovery in injured longshoreman's third-party action, after costs of litigation, including reasonable fees of longshoreman's attorney, were subtracted; and (3) in view of potential for inequitable results being produced by holding, court should consider whether it is reasonable and equitable for attorney to recover claimed sum while injured longshoreman receives nothing, and court may, in exercise of discretion, require adjustment to assure equity for both longshoreman and his attorney.

Reversed and remanded.

Wisdom, Circuit Judge, dissented and filed opinion.

Owen J. Bradley, Michael R. Guidry, New Orleans, La., for plaintiff-appellant.

Thomas W. Thorne, Jr., New Orleans, La., for Employers & N.O. Stevedores.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before WISDOM, REAVLEY and JOHNSON, Circuit Judges.

REAVLEY, Circuit Judge:

Our question is how to allocate money, recovered from a negligent shipowner, as among the injured longshoreman, his attorney, and the stevedore's insurance carrier. We must apply *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 100 S.Ct. 925, 63 L.Ed.2d 215 (1980), to a case in which the recovery is insufficient to cover both the attorney's fee and the compensation carrier's lien. The

district court awarded full reimbursement to the compensation carrier at the expense of the attorney.[1] We reverse.

1. *The Case Below*

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976) ("the Act"), authorizes an injured longshoreman to bring suit against the responsible party—usually the owner of the vessel on which the injury occurred—within six months after receiving a compensation award. 33 U.S.C. § 933(a), (b). Longshoreman Jorge Ochoa brought suit and recovered $62,058 from Waterman Steamship Corporation for injuries sustained while unloading Waterman's vessel. The stevedore's compensation carrier, Employers' National Insurance Company ("ENI"), intervened in the suit to recover medical expenses and compensation benefits,[2] which totalled $42,024 paid to Ochoa by the time of the judgment. The expenses of the litigation aside from the attorney's fee were $6,263.[3] The $55,795 remaining would

[1] On this appeal all have assumed that the agreement between Ochoa and his attorney set the fee at 40% of the total recovery against the shipowner. At oral argument we were given a retainer agreement, signed by Ochoa, which assigns 50% of "any claim or suit I have or may have in this matter" to the attorney. The compensation carrier denies that Ochoa's agreement with his attorney is to commit a fee computed on the total recovery rather than on what Ochoa receives after the compensation repayment is deducted. If the carrier were correct, there would be no problem, and the carrier would enjoy the priority given it by the trial court's judgment.

[2] When a longshoreman recovers from a negligent shipowner, the stevedore has a lien against the recovery in the amount of the stevedore's compensation payments. *See. The Etna,* 138 F.2d 37 (3d Cir.1943). The stevedore's compensation insurance carrier often occupies the place of the stevedore. For purposes of this opinion, there is no difference between the entitlement of "stevedore," "compensation carrier," or "carrier."

[3] There will be an issue upon remand over the correct amount of expenses, as there may be on other figures used herein. If so, that will be for the trial court to resolve.

produce an attorney's fee, at 40% of recovery, of $22,318. If that fee were allowed, the compensation carrier would then recover only $33,477, considerably less than the $42,024 required for full reimbursement. On the other hand, if we allowed the compensation carrier the full $42,024, the remaining $13,771 would be considerably less than the $22,318 expected fee. Furthermore, if the attorney takes the $13,771, the longshoreman receives nothing from the recovery against the shipowner.

The original jury verdict was upheld on appeal. Due to additional benefits extended during the time of appeal, the verdict was inadequate to pay fully ENI's compensation lien and Ochoa's attorney's fee. ENI moved in the district court to amend the judgment to reflect ENI's entitlement to be reimbursed for the additional benefits. Ochoa's attorney opposed the motion, since granting it would leave insufficient funds to pay his fee. The district court granted the motion, and Ochoa appeals.

We conclude that a reasonable fee is an expense of the suit that must be deducted before the compensation carrier or stevedore can be reimbursed. If there is nothing left after that computation of expenses and after the compensation carrier's recovery, the trial court should then consider the reasonableness of the recovery as between the longshoreman and his attorney under all of the circumstances and adjust the allocation in favor of the longshoreman if equity so requires.

2. *The Stipulation*

During the course of the trial the longshoreman through his attorney stipulated with the intervening carrier the amount of the compensation benefits and medical

expenses paid to Ochoa or for his benefit. That stipulation stated that this sum would "take precedence over all other claims of plaintiff" if any damages were recovered by plaintiff. The trial court considered that this agreement gave priority to the carrier over the payment of attorney's fees. We do not construe it to have that effect. The objective of the agreement was to resolve any question about the sum of the carrier's payments.[4] Under the law, that repayment does precede payments to the plaintiff longshoreman. We would not construe the agreement to change the legal rules for the payment of the expenses of the suit, in which both intervenors and plaintiff are interested, without language clearly to that effect. *See Lamar v. Admiral Shipping Corp.*, 476 F.2d 300, 303 (5th Cir. 1973) (longshoremen stipulated that compensation benefits would be repaid to stevedore's carrier free of any claim for attorneys' fees).

3. *Prior to Bloomer*

We now return to a question we have faced previously, although against a different background. In *Strachan Shipping Co. v. Melvin*, 327 F.2d 83 (5th Cir. 1964), we framed the question for decision: "which of the two liens [a reasonable attorney's fee and the stevedore's subrogation lien] take priority when the recovery is insufficient to pay both liens in full." *Id.* at 84. We then affirmed the district court's holding that the longshoreman's attorney's fees were included in the expense of litigation,

[4] In *Chouest v. A & P Boat Rentals, Inc.*, 472 F.2d 1026 (5th Cir.1973), *cert denied*, 412 U.S. 949, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973), the stevedore's insurance carrier thought that a pretrial stipulation guaranteed the carrier full recoupment of its compensation payments. The *Chouest* court refused to give the stipulation the effect urged by the carrier. Instead, the court construed the stipulation to reflect an agreement only as to the *amount* of the medical and compensation payments. *Id.* at 1029, 1031.

which was a first charge against the fund recovered from the third party tortfeasor.

Subsequent cases construing the Act and the 1972 amendments to the Act have significantly altered the setting in which *Melvin* was decided. In the present setting, however, we return to the rule that Ochoa's attorney's fees constitute an expense of suit, which must be satisfied before the stevedore's compensation lien attaches to the net recovery.

An injured longshoreman's cause of action is automatically assigned to the stevedore if the longshoreman does not institute suit within six months after receiving a compensation award. 33 U.S.C. § 933(b). The Act explicitly provides for the distribution of the stevedore's recovery on the longshoreman's cause of action. *See* 33 U.S.C. § 933(e). When the longshoreman sues, however, the Act is silent as to a method of distribution. "[F]illing this statutory lacuna" has been left to the courts. *See Mitchell v. Scheepvaart Maatschappij Trans-Ocean,* 579 F.2d 1274, 1280 (5th Cir.1978). Due to the lack of statutory specificity, the circuits have disagreed in their interpretations of how the Act applies to claims involving the longshoreman-stevedore-shipowner relationship. One principal dispute, now settled, was whether the stevedore could be charged with a portion of the longshoreman's attorney's fees. The circuits had split three ways on this question. *See Bloomer v. Liberty Mutual Insurance Co.,* 445 U.S. 74, 77 n.3, 100 S.Ct. 925, 927 n. 3, 63 L.Ed.2d 215 (1980).

*Mitchell v. Scheepvaart Maatshappij Trans-Ocean,* 579 F.2d 1274 (5th Cir.1978), represented this circuit's equitable approach to the problem of distributing the longshoreman's tort recovery from a negligent shipowner

among the longshoreman, his stevedore, and his attorney. The *Mitchell* court refused to apply a priority rule that would rank claims to the fund on a measured, arithmetic basis. *Id.* at 1279. That approach would be unfair to the injured longshoreman in some circumstances. Instead, the court suggested "application of the equitable rule that he who reaps a harvest for another is entitled to share in the yield." *Id.* at 1278. Thus, trial courts were directed to inquire into the particular circumstances of a case to determine whether the stevedore should be required to contribute to a reasonable fee for the longshoreman's counsel.

4. Bloomer's *Resolution*

The Supreme Court resolved the different approaches among the circuit courts in *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 100 S.Ct. 925, 63 L.Ed.2d 215 (1980). The Court rejected the "equitable apportionment" theory of *Mitchell* and held that the stevedore's compensation lien cannot be taxed to pay part of the longshoreman's attorney's fees. The apportionment or contribution had been justified with the "common-fund" theory: because the longshoreman's attorney helped produce a fund out of which the stevedore was reimbursed for compensation payments, it was fair to charge the stevedore with part of the fee. To resolve the question the Court inquired into the legislative history and Congressional intent behind the Act. Under the Act's "comprehensive scheme," the stevedore is reimbursed after litigation costs, but before any recovery by the longshoreman, when it sues a shipowner pursuant to an assignment from the longshoreman. The stevedore, therefore, bears no part of its legal expense if the recovery covers those expenses and its compensation reimbursement. "There is no reason to believe that Congress intended a different distribution of the expenses

of suit merely because the longshoreman has brought the action." *Id.* at 78, 79, 100 S.Ct. at 923.

5. *After* Bloomer

Despite *Bloomer's* clarification, another question has arisen: when the recovery is insufficient to satisfy both the attorney's contingent fee (if properly calculated on the gross) and the compensation lien, which is entitled to be satisfied first? The Second Circuit and the Seventh Circuit, the only post-*Bloomer* courts to confront the question until now,[5] have reached opposite results. *Compare Incorvaia v. Hellenic Lines, Ltd.*, *"Grigorios-C-IV"*, 668 F.2d 650 (2d Cir. 1982), *cert. denied*, __ U.S. __, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982) (reasonable attorney's fee has priority; compensation lien applies to net proceeds) *with Johnson v. Sioux City & New Orleans Barge Lines, Inc.*, 629 F.2d 1244 (7th Cir.1980) (per curiam), *cert. denied*, 449 U.S. 987, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980) (attorney's contingent fee should be calculated on net recovery after satisfaction of compensation lien). Both *Incorvaia* and *Johnson* purport to be consistent with the intent of the Act, as interpreted in *Bloomer.*

It is important to note that the recovery in *Bloomer*

[5] Since *Bloomer*, we have decided two cases involving apportionment under the Act. *See Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243 (5th cir.1982); *LeBlanc v. Petco, Inc.*,647 F.2d 617 (5th Cir.1981), *cert. denied*, 454 U.S. 1085, 102 S.Ct. 644, 70 L.Ed.2d 621 (1981). In *LeBlanc*, the court applied *Bloomer* and reversed the district court, which had reduced the compensation lien by one-third. In *Pluyer*, after longshoreman Pluyer's total damages were reduced by the amount of his negligence, the recovery amounted to $35,536. After the stevedore's compensation lien of $25,640 was satisfied, a net of $9,896 was paid to Pluyer. Neither case contains any reference to attorney's fees. Moreover, there is no indication that in *Pluyer* or *LeBlanc* the recovery was insufficient to pay all claims.

was ample to pay substantial amounts to the stevedore, the longshoreman, and the longshoreman's attorney. Under the distribution approved by the Court, Bloomer received a net of over $22,700. Under the rejected approach Bloomer would have received over $28,400. Moreover, the Court stated clearly that it did not address the question of priority where a jury award was insufficient to satisfy both the compensation lien and the attorney's fees. *Bloomer*, 445 U.S. at 86, n. 13, 100 S.Ct. at 932 n. 13. "[N]othing in our decision suggests that the stevedore's lien has priority over the longshoreman's expenses." *Id.*

The conflicting results reached by the Second and Seventh Circuits are best explained by their focus on different aspects of *Bloomer*, applied in the context of an inadequate recovery. For example, the Seventh Circuit in *Johnson* focused on one of the purposes of the 1972 amendments to the Act—to reduce litigation. *Johnson*, 629 F.2d at 1249. The *Johnson* court refused to figure the longshoreman's attorney's contingent fee on the gross recovery. That "approach, which gives the attorney a fee based on the benefit to the stevedore, encourages litigation brought nominally on behalf of the longshoreman in cases where the stevedore's interest is relatively greater that the longshoreman's." *Id.* By contrast, the Second Circuit in *Incorvaia* stressed the *Bloomer* Court's analysis of the Act's legislative history, which indicates that the compensation lien attaches only to the longshoreman's net recovery. *Incorvaia*, 668 F.2d at 652.

6. *Attorney's Fee An Expense of Suit*

We cannot avoid the conclusion that Congress intended the compensation lien to come out of the net recovery, after the costs of litigation, including reasonable

attorney's fees, are substracted. We are thus aligned with the Second Circuit in *Incorvaia. Accord Valentino v. Rickners Rhederei, G.M.B.H., SS Etha,* 552 F.2d 466 (2d Cir.1977).

In 1959, Congress amended the Act to eliminate the requirement that an injured longshoreman elect between collecting compensation benefits and suing a third party in tort. "The bill, as amended, provides that an employer must be reimbursed for any compensation paid to the employee out of the *net* proceeds of the recovery." S.Rep. No. 428, 86th Cong., 1st Sess. 2, *reprinted in* 1959 U.S.Code Cong. & Ad. News 2134, 2135 (emphasis added). The *Bloomer* court noted:

> The House version of the amendment would have provided: "[T]he carrier liable for the payment of...compensation shall have a lien on the proceeds of any recovery from [a] third person, whether by judgment, settlement, or otherwise, after the deduction of the reasonable and necessary expenditures, including attorney's fees, incurred in effecting such recovery, to the extent of the total amount of compensation awarded under, or provided, or estimates, by this Act...." H.R.Rep. No. 229, 86 Cong., 1st Sess., 6 (1959). The House passed this version of the amendment, 105 Cong.Rec. 5561-5562 (1959), but later concurred in the Senate version on the evidence [sic] assumption that the Senate version also adopted existing judicial practice. See *id.,* at 15343.

*Bloomer,* 445 U.S. at 81 n. 6, 100 S.Ct. at 929 n. 6.

There is no indication that the 1972 amendments expressed any intent that the compensation lien be satisfied

before reasonable attorney's fees are deducted from the third-party recovery.[6] The 1972 amendments eliminated the unseaworthiness remedy for longshoremen as well as the shipowner's third-party cause of action against the stevedore. These two changes were intended to reduce litigation and to conserve the resources of stevedores so that they would have sufficient funds to pay increased compensation benefits. *See* H.Rep. No. 1441, 92d Cong., 2d Sess. 5, *reprinted in* 1972 U.S. Code Cong. & Ad. News 4698-4705; *Bloomer*, 445 U.S. at 83-85, 100 S.Ct. at 930-31.

The changes effected by the 1972 amendments—increased compensation benefits, abolition of the unseaworthiness remedy, and elimination of the shipowner's cause of action against the stevedore—no doubt helped accomplish the purpose of achieving a reduction in litigation. We decline, however, to read into those amendments an intent to reduce litigation initiated by longshoremen against negligent shipowners. By assuring the vitality of the longshoremen's third-party cause of action we not only promote the longshoreman's interest, but also assist in conserving stevedore resources, one of the purposes behind the 1972 amendments. Because stevedores are assured of having their compensation liens satisfied from net recoveries, longshoremen's third-party suits inure to the benefit of stevedores. If we were to accept the approach proposed by ENI we would unduly impede the ability of longshoremen to avail themselves of the remedy provided by Congress. "[P]ermitting the compensation lien to come ahead of the attorney's lien would deter counsel from pressing long shoremen's claims on a contingent fee basis except 'where

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[6] "[T]o the extent that the 1972 amendments offer guidance, they strongly suggest that the rule for payment of attorney's fees, was not intended to be altered." *Bloomer*, 445 U.S. at 85, 100 S.Ct. at 931.

a recovery substantially in excess of the amount of the stevedore's lien is a virtual certainty.' " *Incorvaia v. Hellenic Lines, Ltd., "Grigorios-C-IV"*, 668 F.2d 650, 653 (2d Cir.1982) (quoting *Valentino v. Rickners Rhederei, G.M.B.H., SS Etha*, 552 F.2d 466, 469 (2d Cir.1977)).

We think that our holding coincides with the Act's "comprehensive scheme," as interpreted in *Bloomer*. The same rationale that persuaded the Court to hold that the longshoreman should bear fully his own legal expenses, *Bloomer*, 445 U.S. at 85, 100 S.Ct. at 931, persuades us to maintain the symmetry of the Act.[7] It would be incongruous to favor the compensation lien over the longshoreman's attorney's fee in distributing a longshoreman's tort recovery when the Act specifically provides that, when the stevedore sues on the longshoreman's claim, expenses, including a reasonable attorney's fee, shall be reimbursed before the compensation lien is paid. 33 U.S.C. § 933(e). When using the term "legal expenses" in *Bloomer*, it is clear that the Court contemplated attorney's fees as being included in those expenses. *See Bloomer*, 445 U.S. at 76 n. 2, 77 n. 3, 84 n. 9, 100 S.Ct. at 927 nn. 2 & 3, 931 n. 9. In footnote six of *Bloomer* the Court cited legislative history stating that the longshoreman was entitled to deduct his expenses from the third-party recovery. *Id.* at 81 n. 6, 100 S.Ct. at 929 n. 6. Footnote six then directs the reader to footnote 13, which discusses *Fontana v. Pennsylvania Railroad Co.*, 106 F.Supp. 461 (S.D.N.Y.1952), *aff'd sub*

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[7] *See Davis v. United States Lines Co.*, 253 F.2d 262, 265 (3d Cir.1958) (to "renounce the rule of *Fontana* [*v. Pennsylvania R.R. Co.*, 106 F.Supp. 461 (S.D.N.Y.1952), *aff'd sub nom. Fontana v. Grace Line, Inc.*, 205 F.2d 151 (2d Cir.1953) (per curiam), *cert. denied*, 346 U.S. 886, 74 S.Ct. 137, 98 L.Ed. 390 (1953) (compensation lien attaches only after attorney's fees are deducted)] would be to rob the statute of symmetry and logic."

*nom. Fontana v. Grace Line, Inc.*, 205 F.2d 151 (2d Cir.1953) (per curiam), *cert. denied*, 346 U.S. 886, 74 S.Ct. 137, 98 L.Ed. 390 (1953). Under *Fontana*, "the expenses of suit, including attorney's fees, represent the first charge on the recovery against the third party." *Bloomer*, 445 U.S. at 86 n. 13, 100 S.Ct. at 932 n. 13. *See Chouest v. A & P Boat Rentals, Inc.*, 472 F.2d 1026, 1034 n. 13 (5th Cir.1973), *cert denied*, 412 U.S. 949, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973).

7. *Reasonableness of the Fee*

By holding that attorney's fees are part of the longshoreman's expenses that are recovered prior to satisfaction of the compensation lien, we stress that only reasonable attorney's fees are allowed. In every case involving distribution of a longshoreman's tort recovery, district courts should assess the reasonableness of the longshoreman's attorney's fee. *See Cappel v. Adams*, 434 F.2d 1278 (5th Cir.1970) (reasonableness of attorney's contingent fee contract within court's discretion.); *see also Johnson v. Sioux City & New Orleans Barge Lines, Inc.*, 629 F.2d 1244, 1248 n. 6 (7th Cir.1980) (per curiam), *cert. denied*, 449 U.S. 987, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980). We continue to "reject any formula under which the plaintiff's contract with counsel would automatically govern" the amount or percentage of the longshoreman's attorney's fee. *Mitchell v. Scheepvaart Maatschappij Trans-Ocean*, 579 F.2d at 1282. Our cases have approved of percentage contingent fees not because plaintiff's contract governed, but because the court determined that such fees were reasonable. *See id.* at n. 11 (citing *Chouest v A & P Boat Rentals, Inc.*, 472 F.2d 1026 (5th Cir. 1973), *cert. denied*, 412 U.S. 949, 93 S.Ct. 3012, 37 L.Ed.2d 1002 (1973), and *Strachan Shipping Co. v. Melvin*, 327 F.2d 83 (5th Cir.1964)); *see also Incorvaia v. Hellenic Lines, Ltd.*,

*"Grigorios-C-IV"*, 668 F.2d 650, 653 n. 4 (2d Cir.1982), *cert. denied*, __ U.S. __, 103 S.Ct. 293, 74 L.Ed.2d 277 (1982) ("reasonableness of the attorney's fee may be challenged, lest it encroach unduly on the net proceeds").

8. *Allocation of the Recovery*

Subject to a contrary agreement between the affected parties, the allocation of the money recovered from a negligent third party is made in the following manner. First, the out of pocket expenses are deducted. Then the attorney's fee, if the court approves it as reasonable, is deducted. The carrier's repayment then takes priority. In the present case, after deducting expenses of $6,263 there is $55,795 for allocation. If the attorney is entitled to a reasonable fee of 40% of that amount, the sum of $22,318 is deducted for that purpose. The balance and no more, of $33,477 goes to the compensation carrier.

9. *Equitable Adjustment*

We acknowledge that in some circumstances, our holding has the potential for producing inequitable results. This is the case where the longshoreman's attorney receives a substantial fee by applying the percentage to the gross recovery, but the longshoreman receives little or nothing because the stevedore's compensation lien consumed the net. *See Strachan Shipping Co. v. Melvin*, 327 F.2d 83, 86-94 (5th Cir.1964) (Brown, J., dissenting) (*Melvin* rule without adjustment subordinates interest of injured worker to that of lawyer on contingent fee); *see also Incorvaia*, 668 F.2d at 653 n. 4 (contrasting concededly reasonable fee of one-third of modest verdict in *Incorvaia* with "undesirable consequences" produced by a 40% attorney's fee applied to substantial recoveries illustrated by

Judge Brown's dissent in *Melvin*). The fairness of the final allocation between the longshoreman and his attorney is a different matter from the reasonableness of the attorney's fee for services rendered in obtaining the total recovery from the negligent tortfeasor. Others have perceived unfairness in a situation where payment of a substantial attorney's contingent fee and the compensation lien leaves a small amount or nothing for the injured longshoreman. For example, the *Mitchell* court noted that plaintiff's counsel declined to charge a one-third contingent fee based on the gross recovery. Describing such a fee as "grossly unjust," plaintiff's counsel instead charged the client one-third of the net recovery. *Mitchell*, 579 F.2d at 1278 n. 6.

In *Scozzari v. Jade Co.*, 350 F.Supp. 801 (E.D.N.Y.1972), the court construed the Act and concluded that the compensation lien attaches to "proceeds net of plaintiff's attorney's fee and other expenses necessary to secure the fund." *Id.* at 804. The *Scozzari* court then considered the case where the fund is insufficient to cover both the attorney's fee and the compensation lien and noted that "it would be inequitable to permit...an injured worker to receive nothing while his counsel receives a substantial fee." *Id.* at 806. The court held, as a matter of equity, that plaintiff's counsel "should share his recovery equally with plaintiff," *Id. Contra Valentino v. Rickners Rhederei, G.M.B.H., SS Etha*, 552 F.2d 466, 470 n. 5 (2d Cir.1977) (longshoreman's attorney cannot share fee with longshoreman).

We think that the *Scozzari* approach is commendable, although we decline to set any certain division between attorney and client in insufficient recovery cases. District courts, however, have discretion to adjust an attorney's fee so that the injured longshoreman can share in the recovery. In reviewing the matter, the court should consider whether

it is reasonable and equitable for the attorney to recover, for example, $22,318, while the injured longshoreman receives nothing. If the attorney has earlier obtained a fee for securing compensation benefits for the longshoreman, a double recovery should be avoided.[8] District courts should take care not to impair the incentive of counsel. A fair return for the attorney should be allowed, determined under all the circumstances.[9] With that consideration in mind, however, the trial court in the exercise of discretion may require an adjustment to assure equity for both the longshoreman and his attorney.

We do not think that *Bloomer* prevents this equitable adjustment. *Bloomer* clearly does not allow an adjustment of the stevedore's recovery to contribute toward the longshoreman's attorney's fees. By contrast, our adjustment operates only as between the longshoreman and his attorney. The compensation lien on the net recovery remains inviolable, consistent with *Bloomer*. Allowing an equitable adjustment between longshoreman and attorney, however, mitigates the effect of that rule in insufficient recovery cases.

The District Court's judgment of September 20, 1982, amended September 24, 1982, is reversed. The case is remanded for reconsideration and reallocation of the original recovery consistent with this opinion.

REVERSED and REMANDED.

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[8] *See Johnson*, 629 F.2d 1244, 1248-49 (to prevent double recovery, Act does not allow attorney, who was awarded fee for securing compensation award, later to receive a fee calculated on gross tort recovery that includes compensation lien).

[9] We maintain "our concern with fair reimbursement for lawyers who represent employees in third party actions." *See Chouest*, 472 F.2d at 1034 n. 13.

WISDOM, Circuit Judge, dissenting:

I respectfully dissent. The majority opinion reflects a thoughtful and conscientious effort to come to grips with a difficult problem. I cannot concur, however, because I find the result irreconcilable with the Supreme Court's interpretation of the Act in *Bloomer*.

As the majority recognizes, *Bloomer* held that "the stevedore's compensation lien cannot be taxed to pay part of the longshoreman's attorney's fees". 724 F.2d at 1174. In *Bloomer*, the Supreme Court repeatedly stressed that Congress intended that the stevedore should recover "the full amount" of its lien from the third-party recovery and that the longshoreman's legal fees should be borne by the longshoreman "alone".[1] Yet the unavoidable result of the majority's approach is to defeat a full recovery by the stevedore by effectively forcing it to pay part of the

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[1] "The legislative history [of the 1959 amendments] demonstrates that Congress did not intend to alter the rule allowing the stevedore to recover the *full amount* of its lien from the longshoreman's third-party recovery." 445 U.S. at 80-81, 100 S.Ct. at 929 (emphasis added).

"[I]n 1972 Congress was informed of, but did not alter, the uniform rule that the longshoreman's legal fees would be paid by the longshoreman *alone*." *Id.* at 85, 100 S.Ct. at 931 (emphasis added).

"[T]he stevedore [s]hould be reimbursed *in full* for his compensation payment." *Id.* at 86, 100 S.Ct. at 932 (emphasis added).

"[O]ur review of the Act and its legislative history persuades us that Congress intended the stevedore to recover the *full amount* of its lien, regardless of who brings the action." *Id.* at 87 n. 14, 100 S.Ct. at 932 n. 14 (emphasis added).

"[Under a contrary holding, the] stevedore would not obtain reimbursement for the *full amount* of its compensation payment, but would instead have that amount reduced by a possibly substantial legal fee." *Id.* at 87, 100 S.Ct. at 932-933 (emphasis added).

longshoreman's attorney's fees. Under the majority's approach, Mr. Ochoa's attorney will recover $22,318 (subject to equitable adjustment) and ENI will recover $33,477. If ENI had been granted priority, however, it would have recovered the full amount of its compensation lien—$42,025. By granting priority to the attorney's fees, the majority in effect compels ENI to pay $8548 of those fees. This amount is 38 percent of the fees; if the district court decreases the attorney's fees under its power of equitable adjustment, the percentage paid by ENI will increase even further. I cannot reconcile this result with *Bloomer*.

As the Second Circuit did in *Incorvaia*, the majority finds support for its position in the legislative history of the 1959 amendments to the Act. *See* 724 F.2d at 1175-1176; *Incorvaia*, 668 F.2d at 652. Such reliance is misplaced, for the 1959 amendments were designed specifically to facilitate third-party suits. *See Bloomer*, 445 U.S. at 80, 100 S.Ct. at 929. This congressional purpose was modified in the 1972 amendments, the primary purposes of which were to reduce litigation and to conserve stevedores' resources so that the stevedores would be better able to pay the substantial increases in compensation benefits mandated by the 1972 amendments:[2]

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[2] The majority's concern for maintaining the logical symmetry of the Act is misguided. The majority finds it "incongruous to favor the compensation lien over the longshoreman's attorney's fee in distributing a longshoreman's tort recovery when the Act specifically provides that, when the stevedore sues on the longshoreman's claim, expenses, including a reasonable attorney's fee, shall be reimbursed before the compensation lien is paid". 724 F.2d at 1176. There is no incongruity in this result, because of the congressional policy of conserving stevedores' resources. Any asymmetry is irrelevant. *Cf.* O. Holmes, The Common Law 1 (1886): "The life of the law has not been logic, it has been experience."

> "The legal expenses incurred by stevedores in connection with third-party actions were understood to be a major obstacle to the funding of increased compensation payments. Numerous witnesses testified that third-party actions frequently inured to the benefit of lawyers, depleting the stevedore's resources and congesting the courts without aiding the injured employee."

*Bloomer*, 445 U.S. at 85, 100 S.Ct. at 931; *see also id.* at 82-86, 100 S.Ct. at 930-932; *Johnson*, 629 F.2d at 1249.

The majority acknowledges these purposes behind the 1972 amendments, but responds by arguing that its approach will ultimately aid stevedores by encouraging third-party suits and thus making it more likely that stevedores will receive reimbursement for the compensation payments. *See* 724 F.2d at 1176. The exact same argument was made, and rejected by the Supreme Court, in *Bloomer*. *See* 445 U.S. at 86 & n. 12, 100 S.Ct. at 932 & n. 12. As the Seventh Circuit has noted, the Act has its own incentive scheme regarding negligence suits against shipowners:

> "In the event the longshoreman does not bring suit against the shipowner within six months—presumably because there is little potential for substantial recovery over and above the compensation award—the stevedore, using its own attorneys and making its own assessment of the likelihood and amount of recovery, can bring suit. That statutory mechanism encourages the stevedore to sue when the negligence claim appears meritorious but the longshoreman's potential incremental recovery is small. Thus, [giving the attorney's fees priority over the compensation lien] encourages litigation brought nominally on behalf of the longshoreman in cases where the

> stevedore's interest is relatively greater than the longshoreman's. Such reflexive litigation brought on behalf of a party with minimal interest in the outcome is inconsistent with the Act's 'special incentives designed to encourage the stevedore to bring suit on its own if the longshoreman elects not to do so.' *Bloomer,* 445 U.S. at 86 n. 12 [100 S.Ct. at 932 n. 12]. Congress, we believe, intended that the stevedore pursue those cases rather than the longshoreman's attorney, who may be motivated by an artificially inflated contingent fee."

*Johnson,* 629 F.2d at 1249 (citations omitted).

As the Supreme Court noted in *Bloomer,* a principal concern underlying the recognition of the stevedore's compensation lien has been the prospect that the longshoreman would receive a "double recovery"—a total recovery in excess of the amount he would have received solely through his third-party action—while the stevedore would not receive full reimbursement. *See* 445 U.S. at 79, 100 S.Ct. at 928. That prospect was a principal concern in the *Bloomer* opinion itself. *See id.* at 80, 87, 100 S.Ct. at 929-932. In any insufficient-recovery case, such as the present one, the longshoreman has *already* received compensation benefits in an amount greater than the net recovery he would have obtained in his negligence action alone.[3] To grant the longshoreman's attorney's fees priority over the compensation lien, and thus effectively to tax the stevedore for part of the attorney's fees, flies in the face of *Bloomer.* The Supreme Court stated in that case:

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[3] In the present case, Mr. Ochoa has received $42,025 in compensation benefits. His net recovery from a third-party suit alone would have been $33,477—the amount of the judgment left after expenses and attorney's fees are deducted.

> "To force the stevedore to [pay part of the longshoreman's legal expenses],...would guarantee the longshoreman a total recovery in excess of the amount he received in his third-party action. *Solely by virtue of the compensation scheme, then, the longshoreman would receive a greater sum than would be possible in an ordinary suit for damages. At the same time the stevedore would be prevented from recovering the full amount of its compensation payment.* The courts concluded that these results would violate legislative purposes...."

445 U.S. at 80, 100 S.Ct. at 929 (emphasis added). The effect of the majority's decision is precisely the result avoided in *Bloomer.*[4]

I believe that the better result would be to follow the approach of the Seventh Circuit in *Johnson:* allow the stevedore to recover first against the longshoreman's judgment, then assess a reasonable attorney's fee in the light of the amount remaining. This approach is consistent with the Supreme Court's interpretation of the Act. The majority's approach is not.

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[4] As the majority notes, the *Bloomer* opinion states that it does not address the issue of priority of liens in an insufficient-recovery situation. 445 U.S. at 86 n. 13, 100 S.Ct. at 932 n. 13. Such a footnote qualification cannot support a result contrary to the reasoning of the opinion.

## APPENDIX "B"

## ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

NO. 82-3618

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JORGE OCHOA,

Plaintiff-Appellant,

v.

EMPLOYERS NATIONAL INSURANCE COMPANY, ET AL,

Intervenors-Appellees,

WATERMAN STEAMSHIP CORPORATION,

Defendant.

Before Wisdom, Reavley and Johnson, Circuit Judges.

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

## APPENDIX "C"

MINUTE ENTRY
September 7, 1982
COLLINS, J.

CIVIL ACTION
NO. 79-3480
SECTION "C"

JORGE OCHOA

VERSUS

WATERMAN STEAMSHIP CORPORATION

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The above entitled matter came before the Court on motion of the intervenor, Employers National Insurance Company (hereinafter ENI), to amend judgment to reflect, and give priority to, the increases in compensation and medical benefits incurred during the pendency of the appeal of this Court's judgment.

WHEREFORE, after careful consideration of the arguments of counsel, the relevant facts, and the applicable law, the Court will and hereby does GRANT intervenor's motion to amend judgment.

/S/ Signed
UNITED STATES DISTRICT JUDGE

REASONS

Nearly two years ago, a jury rendered a verdict in favor of the plaintiff, Jorge Ochoa, and against defendant, Waterman Steamship Corporation, in the amount of $54,437.25, including medical expenses added to the jury verdict as stipulated by the parties. ENI intervened in this

action to recover medical expenses and compensation benefits paid to Mr. Ochoa pursuant to the Longshoremen and Harbor Workers' Compensation Act (hereinafter LHWCA). At the time of the jury verdict, the compensation lien totaled $27,921.73, and in accordance with a joint stipulation entered between the parties, the judgment of this Court ordered that the intervenor recover by preference and priority. The plaintiff proceeded to appeal the jury verdict. During the pendency of the appeal, ENI paid additional benefits to Mr. Ochoa pursuant to LHWCA. The Fifth Circuit Court of Appeals ultimately upheld the original jury verdict, and ENI seeks to have the Court's judgment amended to reflect the $14,103.22 in benefist paid to Mr. Ochoa during the appeal. Plaintiff's attorney opposes the motion to amend judgment on the grounds that the judgment is not sufficient to cover both the compensation lien and the attorney lien. Therefore, if the compensation lien is granted priority under the amended judgment, there will not be sufficient funds to satisfy the attorney lien. Similarly, if the attorney lien is given priority, there will not be sufficient funds to satisfy the compensation lien.

Counsel have thoroughly researched and briefed the Court on this matter. The Fifth Circuit jurisprudence is somewhat confusing. In some cases, the attorney lien was given priority, and the attorney's fees in effect "came off the top." *Chouest v. A & P Boat Rentals, Inc.*, 472 F.2d 1026 (5th Cir.), *cert. denied*, 412 U.S. 949 (1973); *Strachan Shipping Company v. Melvin*, 327 F.2d 83 (5th Cir. 1964). In another decision, the Fifth Circuit held that the compensation lien came first and the attorney's fees were then computed on the "net" recovery. *Haynes v. Rederi*, 362 F.2d 345 (5th Cir. 1966). These inconsistencies can be reconciled under the "equitable apportionment" theory

articulated in *Mitchell v. Scheepvaart Moatschappy Trans-Ocean*, 579 F.2d 1274 (5th Cir. 1978). Under the equitable apportionment approach, the compensation insurer may be, in certain circumstances, charged with a portion of plaintiff's attorney's fees because the insurer benefits from the efforts of the plaintiff's attorney. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74 (1980), rejected the equitable apportionment theory, holding that the compensation insurer could not be assessed a portion of plaintiff's attorney's fees. Instead, the insurer is entitled to be reimbursed for the full amount of the lien. *Bloomer*, however, involved a situation where the amount recovered was sufficient to cover both the compensation lien and the attorney's fees. *Bloomer* did not address the situation, as we have here, where the amount in recovery cannot satisfy both the compensation lien and the attorney's fees. *Id.* at 86 n.13. The Court has been unable to locate any post-*Bloomer* Fifth Circuit decisions on this issue.[1] The Court can only assume that the Fifth Circuit equitable apportionment approach is still applicable in the instant matter.

In the present case, the Court is convinced that the compensation lien should be paid in full without reduction for any portion of plaintiff's attorney's fees. There is a joint stipulation entered between the parties which states in pertinent part: "The undersigned parties...stipulate that if any damages are recovered by plaintiff by way of verdict or settlement that they be so apportioned in the judgment that the claim of Employers National Insurance Company for medical expenses and compensation benefits paid shall

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[1] In *Pluyer v. Mitsui O.S.K. Lines, Ltd.*, 664 F.2d 1243, 1245 n.2 (5th Cir. 1982), the compensation lien was fully reimbursed even though the judgment was apparently inadequate to cover both the compensation lien and the attorney's fee. This issue, however, was not discussed in the Opinion.

take precedence over all other claims of plaintiff." The clear intent of the parties is to give the compensation lien first priority. The plaintiff's attorney apparently believes that he is not bound by the stipulation because it refers only to other claims of plaintiff and not to his claim for attorney's fees. Plaintiff's attorney signed this joint stipulation and, therefore, he knew that the intent of this stipulation was to give priority to the compensation lien. At no point has counsel submitted any document which purports to reserve priority for his fees. The stipulation is silent on this point, and so is the retainer agreement signed by the plaintiff. Considering all of these facts, the Court can only conclude that the parties intended that the plaintiff's attorney's fees be assessed after the compensation lien has been paid in full. *Johnson v. Sioux City & N.O. Barge Lines,* 629 F.2d 1244 (7th Cir.), *cert. denied,* 449 U.S. 987 (1980).

Furthermore, at the time the original judgment was entered, that is before the appeal, the amount in recovery was apparently sufficient to cover both the compensation lien and the attorney's fees. Hence, under *Bloomer,* the ENI was entitled to be reimbursed in full, as reflected in the original judgment. Now, because of compensation benefits paid during the appeal, the funds no longer satisfy the demands of both the compensation insurer and the plaintiff's attorney. By seeking to reduce the compensation lien in order to satisfy his fees, plaintiff's counsel is in effect billing ENI for an appeal which ENI had no interest in pursuing. The Court believes that the risks incurred in the appeal should be properly borne by the plaintiff and his attorney. Accordingly, the Court will GRANT the insurer's motion to amend judgment.

Initialed

## APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 79-3480
SECTION "C" (5)

JORGE OCHOA

VERSUS

WATERMAN STEAMSHIP CORPORATION

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Robert Collins, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Jorge Ochoa, recover of the defendant, Waterman Steamship Corporation the sum of $45,000.00, with interest from the date of entry of judgment until paid, and that by stipulation of the parties, the sum of $9,437.25 be added to the damages found by the jury in consideration of the medical expenses previously paid by the intervenor, Employers National Insurance Company, on behalf of the plaintiff, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that by further stipulation of the parties, the intervenor recover by preference and priority from the aforesaid sums the sum of $18,484.48 in compensation benefits and $9,437.25 in medical expenses, with interest

from the date of entry of Judgment, until paid.

New Orleans, Louisiana, this 26th day of November, 1980.

/S/ Signed
UNITED STATES DISTRICT JUDGE

## APPENDIX "E"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 79-3480
SECTION "C" (5)

JORGE OCHOA

VERSUS

WATERMAN STEAMSHIP CORPORATION

MOTION TO AMEND JUDGMENT

Comes now, Employers National Insurance Company, through undersigned counsel, and shows the court that during the proceedings of these matters on appeal Mr. Jorge Ochoa sought and was paid continued compensation and medical benefits which such payment accordingly increased the compensation lien of intervenor as was originally stated in this court's judgment; and therefore requests that this court amend its judgment to show that compensation and medical expenses paid by intervenor since entry of initial pre-appeal judgment to Mr. Ochoa as a result of the injury complained of total $14,103.22.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the attached amended judgment will be approved and filed by the court to reflect the increases in compensation and medical benefits incurred during the pendency of the appeal of this court's judgment.

New Orleans, Louisiana this 7th day of September, 1982.

/S/ Signed
UNITED STATES DISTRICT JUDGE

LEMLE, KELLEHER, KOHLMEYER
& MATTHEWS

/S/ Douglas P. Matthews

DOUGLAS P. MATTHEWS
2100 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana
Telephone: 504/586-1241
Attorneys for Employers National
Insurance Company

## APPENDIX "F"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 79-3480
SECTION "C" (5)

JORGE OCHOA

VERSUS

WATERMAN STEAMSHIP CORPORATION

JUDGMENT

This action came on for trial before the court and a jury, Honorable Robert Collins, District Judge, presiding, and the issues having been duly tried and the jury rendered its verdict,

IT IS ORDERED AND ADJUDGED that the plaintiff, Jorge Ochoa, recover of the defendant, Waterman Steamship Corporation, the sum of FORTY-FIVE THOUSAND AND NO/100 ($45,000.00) DOLLARS, with interest from the date of entry of judgment until paid, and that by stipulation of the parties, the sum of NINE THOUSAND FOUR HUNDRED THIRTY-SEVEN AND 25/100 ($9,437.25) DOLLARS be added to the damages found by the jury in consideration of the medical expenses previously paid by intervenor, Employers National Insurance Company, on behalf of the plaintiff, Jorge Ochoa.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that by further stipulation of the parties, the intervenor recover by preference and priority from the aforesaid sums the sum of TWENTY-NINE THOUSAND EIGHT HUNDRED ELEVEN AND 37/100 ($29,811.37)

DOLLARS in compensation benefits, NINE THOUSAND FOUR HUNDRED THIRTY-SEVEN AND 25/100 ($9,437.25) DOLLARS in medical expenses and FOURTEEN THOUSAND ONE HUNDRED THREE AND 22/100 ($14,103.22) DOLLARS in compensation and medical expenses paid during the pendency of this matter on appeal, with interest from the date of entry of judgment, until paid.

New Orleans, Louisiana, this 7th day of September, 1982.

/S/ Signed

UNITED STATES DISTRICT JUDGE

## APPENDIX "G"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 79-3480
SECTION "C" (5)

JORGE OCHOA

VERSUS

WATERMAN STEAMSHIP CORPORATION

MOTION TO CORRECT CLERICAL ERROR

Comes now, Employers National Insurance Company, through undersigned counsel, and pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, and upon showing the court that a clerical error has been made in the judgment entered on September 20, 1982 in the third paragraph thereof where the compensation benefits are stated as being in the amount of $29,811.37, when in fact that amount should read $18,484.48; upon further suggesting to the court that counsel for plaintiff has no objection to the granting of this motion; mover hereby requests that the court correct the above stated clerical error and enter its judgment accordingly.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the attached amended and corrected judgment will be approved and filed by the court to reflect the correct amounts due and owing thereunder.

New Orleans, Louisiana, this 24th day of Sept., 1982.

/S/ Signed
UNITED STATES DISTRICT COURT

LEMLE, KELLEHER, KOHLMEYER
& MATTHEWS

/S/ Douglas P. Matthews

DOUGLAS P. MATTHEWS
2100 Pan American Life Center
601 Poydras Street
New Orleans, Louisiana
Telephone: 504/586-1241
Attorneys for Employers National
Insurance Company

Office - Supreme Court, U.S.
FILED
OCT 5 1984
ALEXANDER L. STEVAS,
CLERK

NO. 84-55

# In the Supreme Court of the United States

OCTOBER TERM, 1984

EMPLOYERS NATIONAL INSURANCE COMPANY,

Petitioner

versus

JORGE OCHOA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OWEN J. BRADLEY
Counsel of Record
LAW OFFICES OF OWEN J. BRADLEY
1001 Maison Blanche Building
New Orleans, Louisiana 70112
Telephone: (504) 523-4122

Attorneys for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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## ARGUMENT

### 1.

**There is no conflict between the decision of the United States Court of Appeals for the Fifth Circuit and *Bloomer v. Liberty Mutual Insurance Company*, 445 U.S. 74, 100 S.Ct. 925 (1980).**

*Bloomer* dealt with a sitution where the recovery from a longshoreman's third party action against a vessel was sufficient to pay in full both the expenses of the suit, including attorney's fees, and the stevedore's lien. The gross recovery in Bloomer was sufficient to allow the stevedore's lien to be paid in full regardless of whether the attorneys fees or the stevedore's lien "come off the top." Thus, the Court never reached the question presented here, i.e. the priority of payments when the gross recovery is insufficient to fully pay both attorneys fees and the stevedore's lien. In fact, the Court expressly declined to rule on the question. 445 U.S. at 86 n. 13.

### 2.

**The decision of the United States Court of Appeals for the Fifth Circuit is consistent with the rationale of Bloomer, and with The Longshoremen's and Harborworkers' Compensation Act.**

By artful phrasing of the issue, Petitioner attempts to place the decision of the Fifth Circuit in conflict with the rationale of Bloomer, that the stevedore cannot be charged with a portion of longshoreman's attorneys fees under the "common fund doctrine".

However, *Bloomer* did not hold that the attorneys fees could be charged with the stevedore's lien. Although Bloomer did not attempt to decide this issue, a number of statements in the *Bloomer* opinion, as well as references to the legislative history of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §901 show that, while the stevedore cannot be made to pay the longshorman's legal fees, the stevedore's lien extends only to the **net** recovery by the longshoreman after payment of the expenses of the suit, including legal fees. *Ochoa v. Employers National Insurance Company,* 724 F.2d. 1171, 1175-7 (5th Cir. 1984); *Incorvaia v. Hellenic Lines, Ltd, "Grigorios-C IV"*, 668 F.2d. 650, 652 (2nd Cir. 1982).

It should also be noted that in the Court's illustration of the two suggested methods of distribution in *Bloomer,* as well as its use of the term "expenses" to include the longshoremens attorneys fees, the opinion further implies that attorneys fees are an expense of the suit, to be paid before reimbursing the stevedore. 445 U.S. at 76 n. 2.

The opposing view, expressed in the dissent in *Ochoa,* and in *Johnson v. Sioux City & New Orleans Barge Lines, Inc.,* 629 F2d. 1244(7th Cir. 1980), is that giving attorneys fees priority over the stevedore's lien only encourages attorneys for longshoremen to bring third party suits on behalf of longshoremen, even though the longshoremen have little chance of realizing a recovery above the amount of attorneys fees and stevedore's liens. The assumption is that longshoremen's attorneys, lured by

the prospect of substantial fees, routinely usurp the stevedores' right of action by filing suits which should be filed by the stevedore, and in which the longshoremen have little to gain. This assunption is not valid in a general sense, and is certainly not valid in the instant case.

For several reasons, stevedores often fail to pursue claims as envisioned by the Act.

First, the stevedore may be afraid to jeopardize its relationship with a valued customer.

Second, the expense and risk of a third party action may not justify the stevedore's pursuit of the action, since the stevedores potential real gain is limited to the amount of its lien.

Respondent submits that the problems of insufficient recovery in this case, and in most similar cases, are caused simply by unexpectedly low verdicts.

At the trial of the instant case, expert medical and economic testimony put Respondent's partial loss of earning capacity at above $100,000. The vessel owner made an offer of settlement during trial of $80,000, including a waiver of the compensation lien. Liability was doubtful, and was only established by a witness, who was discovered a few weeks before trial, and whose veracity was hotly disputed by the vessel. This was hardly a case with "little potential for substantial recovery over and above the compensation award" or one where the claim appeared

"meritorious but the longshoreman's potential incremental recovery is small." *Johnson*, 629 F2d. at 1249. It was a case with difficult liability, but with the potential for a large verdict.

Additionally, out of pocket expenses in bringing the case to trial were over $6000, and counsel for Respondent spent well over a hundred hours in preparing for trial. If the the stevedore had brought the action, the cost of preparing for trial would have been well over $10,000. In view of the liability problems, and the large expense, it is not reasonable to suppose that the stevedore would have risked such an amount to recover a lien of only two to three times that amount which existed at the time of trial. Thus, the *Johnson* rationale is inapplicable.

3.

**The decision of the United States Court of Appeals for the Fifth Circuit does not result in double recovery for Respondent in excess of that which would result from Petitioner's proposed distribution.**

The third question presented by Petitioner is not addressed in its argument, but is an apparent reference to the *Bloomer* opinion's concern with "double recovery", i.e. the longshoreman's receipt through the effects of the Act of an amount greater than he would have received from a negligence suit in the absence of the Act. 445 U.S. at 86-87. As was pointed out in the dissent in *Ochoa*, in cases like the

instant one, the longshoreman will *always* receive an amount greater than he could have through the negligence action alone. 724 F2d. at 1180. However, the stevedore's proposed distribution scheme would result in a greater double recovery by the longshoreman than would the method proposed by Respondent (total recovery $42,025 plus $3,689 as opposed to only $42,025).

4.

**The increase in the stevedore's lien during the pendancy of an appeal does not change the priorities of the distribution of the funds recovered in the suit.**

Petitioner contends that its recovery should not be adversely affected by an increase in the stevedore's lien during pendency of an unsuccessful appeal "contrary to the stevedore's interests."

This is a false issue. Carried to its logical conclusion, Petitioner's argument requires that, if at any point in the litigation the longshoreman has within his grasp an amount sufficient to satisfy the stevedore's lien, then he must forego all of his remaining rights of action in order to ensure payment of the stevedore's lien in full.

Petitioner's argument would apply equally to a longshoreman's refusal to accept an offer of settlement before trial. If such an offer were greater than the sum of out of pocket expenses, attorney's fees, and the stevedore's lien, then proceding to trial would be "contrary to the stevedore's interests."

Additionally, Petitioner mistates the effect of the appeal on the stevedore's recovery. The appeal did not cause "its recovery to be reduced." Under either of the proposed distributions presented in the Petition, the stevedore's recovery would be greater than it would have been immediately after trial.

Under the stevedore's proposed distribution, Respondent's counsels' fees would be reduced substantially merely because they represented their client vigorously in appealling what they believe was an unreasonably low verdict. Acceptance of Petitioner's argument would result in a significant disincentive to longshoremen's counsel to represent their clients to the fullest.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writs of certiorari be denied.

Respectfully Submitted,

The Law Offices of Owen J. Bradley

By:_____

Owen J. Bradley
1001 Maison Blanche Bldg.
New Orleans, La.
Phone: 523-4122

Attorneys for Respondent

## CERTIFICATE OF SERVICE

I certify that three copies of the above opposition to petition for writ of certiorari were served upon counsel for petitioner, first class postage prepaid, addressed to his office in New Orleans, Louisiana, this 3rd day of October, 1984.

---

Owen J. Bradley
Attorney for Respondent

Office - Supreme Court, U.S.
FILED
NOV 13 1984
ALEXANDER L. STEVAS,
CLERK

NO. 84-55

# In the Supreme Court of the United States

OCTOBER TERM, 1984

EMPLOYERS NATIONAL INSURANCE COMPANY,

Petitioner

versus

JORGE OCHOA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## SUGGESTION OF MOOTNESS

THOMAS W. THORNE, JR.,
Counsel of Record
LEMLE, KELLEHER, KOHLMEYER,
HUNLEY, MOSS & FRILOT
21st Floor, Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130-6097
Telephone: 504/586-1241

Counsel for Petitioner

PETITION FOR CERTIORARI FILED JULY 12, 1984
CERTIORARI GRANTED OCTOBER 29, 1984

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

NO. 84-55

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EMPLOYERS NATIONAL INSURANCE COMPANY,

Petitioner

versus

JORGE OCHOA,

Respondent

---

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

# SUGGESTION OF MOOTNESS

---

On October 29, 1984, the Clerk wrote Petitioner that its Petition for a Writ of Certiorari was granted. Petitioner feels obliged to file this Suggestion of Mootness in view of developments subsequent to the filing of its Petition for Writ of Certiorari on July 12, 1984 which were not brought to this Court's attention in the brief filed in opposition to its petition on October 3, 1984.

On September 28, 1984, the President signed the 1984 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

Section 933 of the Act, which is the controlling section in this case, was amended as follows:

## COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

Sec. 21.(a) Section 33 (b) is amended to read as follows:

"(b) Acceptance of compensation under an award in a compensation order filed by the deputy commissioner, an administrative law judge, or the Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such acceptance. If the employer fails to commence an action against such third person within ninety days after the cause of action is assigned under this section, the right to bring such action shall revert to the person entitled to compensation. For the purpose of this subsection, the term 'award' with respect to a compensation order means a formal order issued by the deputy commissioner, an administrative law judge, or Board."

(b) Section 33(e)(2) is amended by striking out ", less one-fifth of such excess which shall belong to the employer".

(c) Section 33(f) is amended—

(1) by inserting "net" before "amount recovered"; and

(2) by adding at the end thereof the following: "Such net amount shall be equal to the actual amount recovered less the expenses

reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).".

(d) Section 33(g) is amended to read as follows:

"(g)(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) for an amount less than the compensation to which the person (or the person's representative) would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

"(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this Act shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this Act.

"(3) Any payments by the special fund established under section 44 shall be a lien upon the proceeds of any settlement obtained from or judgment rendered against a third person referred to under subsection (a). Notwithstanding any other provision of law, such lien shall be enforceable against such proceeds, regardless of whether the Secretary

on behalf of the special fund has agreed to or has received actual notice of the settlement or judgment.

"(4) Any payments by a trust fund described in section 17 shall be a lien upon the proceeds of any settlement obtained from or judgment recorded against a third person referred to under subsection (a). Such lien shall have priority over a lien under paragraph (3) of this subsection.".

The Joint Explanatory Statement of the Committee of the Conference, as it pertains to the amendment of Section 933, reads as follows:

## COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

*Senate Bill and House Amendment*

The Senate bill and the House amendment both provide for a reversion to the employee of a right to file an action against a third person. The Senate bill affords this right following a "reasonable time" after such right passes initially from the employee to the employer without the employer filing such action. The House amendment requires ruling within 90 days.

The Senate bill and the House amendment also address when the 6-month period, within which period the employee has an initial right to file an action against a third party, begins to run. The Senate bill states that this period begins running at the issuance of a formal compensation order. The House amendment states that the period begins running either on issuance of a formal order or on payment to compensation voluntarily by an employer.

The Senate bill and the House amendment both alter the priority for distribution of proceeds in a recovery by judgment or settlement where the employee brings an action against a third party. The Senate bill gives priority to the employer's lien on compensation and medical benefits paid, with the employee retaining any excess first for payment of attorney fees and costs. In a recovery by judgment only, the House amendment guarantees the employee 15 percent of any recovery remaining after reduction for attorney fees and costs, before exercise by the employer of its subrogation lien rights.

*Conference Substitute*

The Conference substitute provides that the 6-month period within which a person entitled to compensation can file a third party suit commences only upon the entry of a formal order awarding compensation. This is in accord with the decision in *Pallas Shipping Agency v. Duris,* 103 S. Ct. 1991 (1983). The conferees expect that an employer who does make voluntary payments will be able to obtain without delay the necessary compensation order constituting the formal award, so that the 6-month period may commence. Once the assignment occurs, the employer has 90 days within which to file suit; otherwise, the right to sue reverts back.

The Conference substitute establishes the following priority for distribution of proceeds in a recovery by an employee: First, the litigation expenses, including reasonable attorney fees, are satisfied. This may require that the court exercise its discretion to adjust the attorney fee to assure equity for both the employee and his attorney. The compensation lien on the net recovery remains inviolable, consistent with *Bloomer v. Liberty Mutual Insurance, Co.,* 445 U.S. 74 (1980).

## ARGUMENT

Petitioner urges that the 1984 amendment of Section 933 does not render the present case moot insofar as its national significance is concerned. While the Committee Report clearly adopts the formula of the Fifth Circuit in the case below for the distribution of the proceeds of a third party judgment secured by the longshoreman, that intention is simply not expressed in the amendment. It is the amendment, not the Committee report, which necessarily governs the rights of past and future litigants.

The Court will note that Section 933(e), which the Court deemed significant in *Bloomer v. Liberty Mutual Ins. Co.*, 100 S.Ct. 925, 928 (1980), is unchanged except for "the striking of the one-fifth of such excess shall belong to the employer", 933(e)(2).

Section 933(f) is also amended to provide, in essence, that the credit to the Employer for further compensation owed to the longshoreman shall be computed on the net rather than the gross recovery against the third party, i.e. after the payment of expenses and reasonable attorney's fees. This amendment, Petitioner submits, merely adopts the prior rulings of the lower courts and applies to the credit against future compensation owed by the compensation carrier to the longshoreman, not the allocation of the proceeds of a judgment between the longshoreman, his attorney and the compensation carrier.

This contradiction between the intent of Congress, as expressed in the Committee Report, and the amendment, as enacted, further clouds rather than clarifies the law insofar as future litigants and Courts are concerned and this Court, Petitioner submits, is the only Court which can

decide whether Congress has or has not enacted what its Committee Report says it intended to enact.

For the foregoing reasons, Petitioner submits that the present case is not moot and that the uncertainty which prompted this Court to grant the present writ is further compounded by the contradiction between the 1984 amendment and the Committee Report.

Pending the Court's action on this suggestion of mootness, Petitioner requests that the time for filing of the joint appendix and Petitioner's brief be suspended.

Respectfully submitted,

THOMAS W. THORNE, JR.,
Counsel of Record
LEMLE, KELLEHER, KOHLMEYER,
HUNLEY, MOSS & FRILOT
21st Floor, Pan American Life Center
601 Poydras Street
New Orleans, Louisiana 70130-6097
Telephone: 504/586-1241

Counsel for Petitioner

## CERTIFICATE OF SERVICE

I certify that three copies of the above Suggestion of Mootness were served upon counsel for the respondent, first class postage prepaid, addressed to his office in New Orleans, Louisiana, this 9th day of November, 1984.

THOMAS W. THORNE, JR.
Counsel for Petitioner

DEC 7 PAGE 12

Supreme Court, U.S.
FILED
DEC 6 1984
ALEXANDER L. STEVAS
CLERK

NO. 84-55

# In the Supreme Court of the United States

OCTOBER TERM, 1984

EMPLOYERS NATIONAL INSURANCE COMPANY,

Petitioner

versus

JORGE OCHOA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## RESPONSE TO SUGGESTION OF MOOTNESS

MICHAEL R. GUIDRY
Counsel of Record
LAW OFFICES OF OWEN J. BRADLEY
1001 Maison Blanche Building
New Orleans, Louisiana 70112
Telephone: (504) 523-4122

Counsel for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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NO. 84-55

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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versus

JORGE OCHOA,

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

RESPONSE TO SUGGESTION OF MOOTNESS

---

## LEGISLATIVE HISTORY

Respondent submits that, in addition to those portions of the Amendments and the legislative history quoted in Petitioner's Suggestion of Mootness, other portions of the legislative history are significant in interpreting the Longshore and Harbor Workers' Compensation Act Amendments of 1984.

Original Senate Bill 38 contained the following wording which would have legislatively mandated the distribution scheme proposed by Petitioner, i.e. priority would have been given to the stevedore's lien:

(2) Any amount recovered by the person entitled to compensation on acount of the proceedings by judgment or settlement, whether or not the settlement is approved by the employer in accordance with subsection (g), shall be distributed as follows:

(A) The person entitled to compensation shall pay to the employer an amount equal to the sum of—

(i) the cost of all benefits furnished to the person by the employer under section 7; and

(ii) all other amounts payable as compensation or benefits under this Act.

(B) The person entitled to compensation or the person's representative shall retain the amount remaining after the payment required by subparagraph (A).
S. 38, 98th Cong. 1st Sess, 129 Cong. Rec. S8658 (1983).

This provision was rejected by the House of Representatives and replaced with the following language which would have required subtraction of attorney fees, expenses of the suit, and a payment of a 15 percent portion of the judgment to the longshoreman before payment of the compensation lien:

(f)(1) If a person entitled to compensation under this Act institutes a proceeding within the period described in subsection (b) and recovers by a judgment an amount in the proceeding against a third party, the person instituting such proceeding shall be permitted to retain an amount equal to 15 per centum of (A) the amount so recovered, minus (B) the expenses incurred by such person in respect to such proceeding (*including a reasonable attorney's fee*)....

> (3) The balance, *if any*, of the amount recovered (*after the deduction required by paragraph (1) and the expenses described in clause (B) of such paragraph*) shall be distributed as follows:
>
> (A) there shall be paid to the employer from such balance an amount equal to the sum of the costs of all benefits and compensation actually furnished to the person.... S. 38, as amended, 98th Cong. 2nd Sess, 130 Cong. Rec. H2484 (1983). (emphasis added)

The Joint Explanatory Statement of the Conference Committee, as well as the final wording of the Amendments has already been quoted in Petitioner's suggestion.

A summary of the conference committee's substitute is contained in the House proceedings. It states in pertinent part:

> Clarifies priority of distribution of third party awards where the employee brings the action, *adopting current law with respect to the priority but permitting a judge to consider reasonableness of attorney fees.* 130 Cong. Rec. H9736 (1984). (emphasis added).

Just before the Senate's adoption of the Conference Committee Report, Senator Nickles gave an extensive explanation of the intent of the Amendments:

> **THIRD PARTY ACTIONS BY EMPLOYEES**
>
> The Senate bill amended section 33(f) to establish that compensation paid by an employer shall be a first lien on any proceeds obtained by an employee in a tort suit against a third party.

Implicit in this proposal was that the legal expenses of the employee, including attorney fees, would be totally subordinated to the compensation lien. The House amendment essentially reversed the order of priority. It would have permitted the employee to pay his attorney fees and litigation expenses first, before satisfaction of the compensation lien. This would be important where an employer's lien equalled or exceeded the amount recovered in the third party action. The House committee was concerned that an employee might conceivably be worse financially after incurring the expense of a suit than if he never had brought an action at all. In addition, the House committee believed that the employee was entitled to shelter a portion of recovery [15 percent] from any compensation lien. That committee viewed the 15 percent set-aside as comparable to the employer's right under section 33(e)(2) to retain 20 percent of any recovery in excess of litigation expense and compensation liability.

The conference agreement adopts a middle ground. First, it rejects the 15 percent set-aside in the House amendment and modifies current law by eliminating the employer's 20 percent set-aside in section 33(e)(2). *Second, it requires that the employee's litigation expenses including reasonable attorney fees, be paid out of any recovery prior to the satisfaction of the compensation lien.* It should be stressed though how this rule has special application in the cases where the aggregate of the litigation expenses, the employee's legal fees, and the compensation lien leave the employee with little, if any, recovery. *In such circumstances, the conferees found merit in the approach articulated by the court in Ochoa v. Employers National Insurance Company,* 724 F.2d 1171 (5th Cir. 1984). That case held that where an employee's third party recovery was insufficient to cover both his attorney fee and

> the compensation lien, the lien was payable out of the net recovery, after costs of litigation, including reasonable attorney fees, were subtracted. The court of appeals emphasized that only reasonable attorney fees were allowed. Thus, where the recovery is insufficient to cover both the attorney fees and the compensation lien, leaving the employee with nothing, the court must evaluate the reasonableness of the fees and make an equitable adjustment as between the employee and his attorney. As noted in *Ochoa*, this approach attempts to do justice to the employee while upholding *Bloomer v. Liberty Mutual Life Insurance Company*, 445 U.S. 74 (1980), which forecloses an adjustment of an employer's lien in order to underwrite the attorney fees of the employee. 130 Cong. Rec. S11,626 (1984) (remarks of Sen. Nickles). (emphasis added)

An implicit assumption of Petitioner's Suggestion of Mootness is that the Longshore and Harbor Workers' Compensation Act Amendments of 1984 are applicable to the instant case. The applicability of the Amendments is clear from their wording:

> Except as otherwise provided in this section, the amendments made by this Act shall be effective on the date of enactment of this Act and shall apply both with respect to claims filed after such date and to claims pending on such date. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Act of Sept. 28, 1984, Pub. L. No. 98-426, Sec. 28(a), 98 Stat. 1639.

## ARGUMENT

While admitting that the Congress clearly intended to adopt the approach of the Fifth Circuit in the case below,

Petitioner argues that, since the amendments did not change any wording of the Act regarding distribution of proceeds of recoveries from third parties, then the Act's meaning has remained unchanged: "It is that amendment, not the Committee report, which necessarily governs the rights of past and future litigants."

If the Congress intended to adopt the Fifth Circuit's approach in *Ochoa*, below, then why was there no wording to that effect in the amendments themselves? The obvious answer as shown by the history is that the legislators viewed the rule adopted in this case below as the current law. There was no reason for the Amendments to explicitly adopt the current construction of the Act. An additional, very strong indication of Congressional intent is that the provisions of the original senate bill which would have adopted Petitioner's construction of the act were explicitly rejected by the Congress.

In *Bloomer v. Liberty Mutual Life Insurance Company*, 445 U.S. 74, 100 S.Ct. 925 (1980), this Court spent page upon page attempting to analyze congressional intent based upon nuances in committee reports and statements in the Congressional Record, even though the 1972 Amendments omitted any mention of the issue of the compensation lien being taxed for attorneys fees. The court stated its interpretation of Congressional inaction:

> Moreover, in 1972 Congress was informed of, but did not alter, the uniform rule that the longshoremen's legal fees would be paid by the longshoreman alone. In these circumstances we are reluctant to take steps to change that rule on our own. 445 U.S. at 85.

Yet under almost identical circumstances, Petitioner is asking the Court to dismiss overwhelming evidence of Congressional intent merely because no new wording was added.

## CONCLUSION

For the foregoing reasons, Respondent submits that the Congress has made clear its intent to legislatively enact the approach adopted in the Fifth Circuit in this case below, and that such enactment rendered this case moot.

Respectfully Submitted,

LAW OFFICES OF OWEN J. BRADLEY

BY: _____

MICHAEL R. GUIDRY
1001 Maison Blanche Building
New Orleans, Louisiana 70112
Telephone: (504) 523-4122

Counsel for Respondent

## CERTIFICATE OF SERVICE

I certify that three copies of the above Response to Suggestion of Mootness were served upon counsel for petitioner, first class postage prepaid, addressed to his office in New Orleans, Louisiana, this 5th day of December, 1984.

MICHAEL R. GUIDRY